

IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE OFFICE PLANNING GROUP, INC.,

Plaintiff/Appellee

Supreme Court No. ¹²⁵⁴⁴⁸~~125502~~

vs.

Court of Appeals No. 245155

ROD LIIMATAINEN / BARAGA -
HOUGHTON - KEWEENAW CHILD
DEVELOPMENT BOARD, INC.

Lower Court Case No. 01-11593- CZ

Defendants/Appellants

DEFENDANTS/APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

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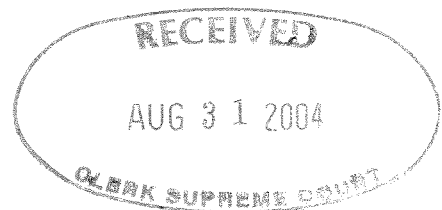


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STATEMENT OF BASIS OF JURISDICTION

Defendant filed a Claim of Appeal by Right under MCR 7.203(A)(1) from an Order Following Consideration of Defendant's Motion for Summary Disposition entered on November 7, 2002. This Order is a final Judgment disposing of all claims and adjudicating the rights and liabilities of all parties under MCR 7.202(7)(a)(I).

The Claim of Appeal was timely filed within 21 days thereafter on November 27, 2002. The Michigan Court of Appeals issued its Opinion on November 4, 2003. A timely Motion for Reconsideration was filed and then denied on December 10, 2003. Pursuant to MCR 7.301(A)(2), this Court has jurisdiction from a timely Application for Leave to Appeal was filed on January 19, 2004, which was granted on July 1, 2004.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE COURTS LACK JURISDICTION OVER A DISPUTE UNDER 42 USC 9839(a) FOR REASONABLE PUBLIC ACCESS TO THE BOOKS AND RECORDS OF A PRIVATE, DELEGATED HEAD-START AGENCY RECEIVING FEDERAL FUNDS FOR ITS SERVICES?

Appellants BHK state: "Yes."
Appellee OPG states: "No."
Trial Court states: "No."
Court of Appeal states: "No."

II. WHETHER THE DISCLOSURE OF ALL BIDS SUBMITTED FOR OFFICE FURNITURE WAS REQUIRED UNDER THE PLAIN MEANING OF 42 USC 9839(a) WHERE IT DOES NOT EXPRESSLY APPLY TO DELEGATED HEAD-START AGENCIES, DOES NOT AUTHORIZE A PRIVATE ENFORCEMENT ACTION FOR THE GENERAL PUBLIC, AND ITS PURPOSE TO PROTECT THE EXPENDITURE OF FEDERAL FUNDS IS SERVED BY HHS' AUDITING REGULATIONS?

Appellants BHK state: "Yes."
Appellee OPG states: "No."
Trial Court states: "No."
Court of Appeal states: "No."

III. WAS REASONABLE PUBLIC ACCESS TO BHK'S RECORDS AND DOCUMENTS UNDER 42 USC 9839(a) PROVIDED WHEN IT DISCLOSED ITS PROCUREMENT POLICY, CONDUCTED PUBLIC HEARINGS, AND ANNOUNCED THE AMOUNT OF THE WINNING BID FOR OFFICE FURNITURE?

Appellants BHK state: "Yes."
Appellee OPG states: "No."
Trial Court states: "No."
Court of Appeal states: "No."

STATEMENT OF THE CASE

On April 30, 2001, the Plaintiff filed a Complaint relying on the Michigan Freedom of Information Act, (MCL 15.231 *et seq.*; MSA 4.10801(1) *et seq.*; MFOIA), to obtain copies of all the bids submitted for Defendant's purchase of office equipment. (Complaint, APX. p. 1a). During discovery, Plaintiff submitted several sets of interrogatories to obtain through discovery what it could not legally obtain under the law. Due to Defendant's objection, a Motion to Compel and a corresponding Motion for Entry of a Protective Order were filed. The trial court temporarily granted the Protective Order pending the outcome of the Defendant's Motion for Summary Disposition. (9/14/01 hrg., pgs. 17-21, APX. p. 25a-29a). Meanwhile, an Amended Complaint was filed and contained the new theory of recovery under "certain federal legislation". (Am. Complaint, APX. p. 5a). Plaintiff explained that the "federal legislation" meant 42 USC 9839(a). (4/1/02 hrg. pgs. 28-29, APX. p. 42a-43a).

Defendant's Summary Motion was filed on June 21, 2002. The four issues before the court included whether the federal and state Freedom of Information Acts applied, the lack of jurisdiction, and whether disclosure of all the bids was "reasonable public access." (08/16/02 hrg., p. 43, 54-60, APX p.59a - 76a). Plaintiff responded on July 23, 2002. On October 15, 2001, the Motion was heard, testimony was taken, and the trial court's Opinion was issued on November 7, 2002. (Order Following Consideration of Defendants' Motion for Summary, "SD Order", APX. p. 166a). Although granting BHK's Motion on the FOIA claim, the court compelled complete disclosure of all bids under 42 USC 9839(a) and denied BHK's stay of proceedings. Defendant's Claim of Appeal was filed on November 26, 2002, and its Stay Motion was granted on December 11, 2002. The Michigan Court of Appeals' Opinion was issued on November 4, 2003. (APX p. 169a). A Motion for Reconsideration was timely

filed asserting a lack of jurisdiction, but was denied on December 16, 2003. (APX. p. 179a). The Application to this Court was granted on July 1, 2004. (APX. p. 180a).

INTRODUCTION

This appeal arises out of a private, non-profit corporation's¹ administration of a number of community-service programs, specifically head-start, and its denial of a disappointed vendor's² request for a complete copy of all the bids submitted for its purchase of office equipment. The preliminary question is whether the state court should entertain OPG's lawsuit to compel disclosure pursuant to 42 USC 9839(a), which provides for 'reasonable public access to records and documents', when Congress expressly delegated the task of regulating the head-start program's administrative standards to the federal head-start agency³, and under the HHS' rules and regulations the HHS determined that the local head-start agency had no obligation to disclose those records. If OPG disagreed, its redress was first through completion of the HHS administrative process and then to appeal.

But, even if the state court can concurrently entertain the dispute, its decision to compel disclosure was unwisely founded upon an overly broad construction of the text of 42 USC 9839(a). Implying a private right of enforcement of 42 USC 9839(a) constituted judicial legislation, a lack of due deference to the federal agency's regulation, and wrongly discounted HHS' officials implementation of its legislative mandate. BHK's disclosure of its procurement policy and the procurement procedures followed in this purchase met the 'reasonable public access to records and documents' requirement.

¹Defendant Baraga-Houghton-Keweenaw Child Development Board, Inc. ("BHK")

²Office Planning Group, P.C. ("OPG")

³Health and Human Services Agency (HHS)

STANDARD OF REVIEW

Unless a court has subject-matter jurisdiction, it has no right to issue a declaratory or any other judgment. Bd of Com'rs of Eaton Co v Schultz, 205 Mich App 371; 521 NW2d 847 (1984). The acts and proceedings of a court without jurisdiction are void. Jackson Community College v Dept of Treasury. (On Rehearing), 241 Mich App 673; 621 NW2d 707 (2000). The question of whether subject-matter jurisdiction exists is a question of law for the court and may be raised at any time. Bd of Co Rd Com'rs of Eaton Co v Schultz, *supra*; Deeg v City of Detroit, 345 Mich 371; 76 NW2d 16 (1956). The lack of primary jurisdiction is likewise a question of law reviewed *de novo*. Travelers Ins Co v Detroit Edison Co., 465 Mich 185; 631 NW2d 733 (2001).

The Order granting or denying a Motion for Summary Disposition is reviewed *de novo*. Spiek v Department of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court's interpretation of a statute is a question of law, which is reviewed *de novo*. Karpinsky v St. John Hospital, 238 Mich App 539, 542; 606 NW2d 45, 47 (1999).

STATEMENT OF FACTS

Mr. Rodney Liimatainen is the Executive Director of Defendant BHK. (Executive Director's Affidavit APX. p. 53a). BHK is a private, non-profit corporation that was established by civic-minded citizens of the tri-county Keweenaw area and operates programs to assist the community, such as the Head-Start Program. OPG is a private, for-profit corporation that has its principle place of business in Dickinson County. (¶ 5, APX. p.54a).

In January of 2001, BHK solicited bids on various office needs. (Bid Proposal and Notice, APX. p. 181a; List of companies submitting bids, APX. p. 187a; 10/15/02 hrg., J. Ham, OPG's agent, pgs. 130-131, APX. p. 148a-149a). The bids were scheduled for review at 4:00 p.m. on the 15th, but

three bidders on the furniture and cubicles requested an extension to the January 29, 2001 meeting, which was granted. (1/15/01 Bd. Meeting Minutes, APX. p. 188a-189a). Verbally, they were advised that the bids would be opened at 10:00 a.m. on the 29th in an open meeting of the Building Committee where it would formulate its recommendation to the Board. Its recommendation would be considered later that day at the January 29, 2001 Board Meeting. (10/15/02 hrg., pgs. 80-84, APX. p. 98a-102a, 110-113; 1/15/01 Bldg. Committee Minutes, APX. p. 192a). Although none of the bidders appeared, all were advised of the result. As a matter of courtesy, OPG's agent, Mr. Ham, was personally called because OPG's bid was significantly higher than at least two other bidders - about \$10,000.00. (10/15/02 hrg., p. 81-83, APX. p. 98a-102a).

Disappointed, Mr. Ham verbally requested complete copies of all the bids. BHK's Executive Director informed him that the details of each bid were unavailable for inspection by the public. (10/15/02 hrg., p. 81-83, 88-89 APX p. 98a-102a, 106a-107a). The Director explained that each bid may contain small differences in manufacturers, quality, and type of product. (Id.) He objected to providing the information because it was extra work, was not required, and the other bidders did not want the information disseminated. (10/15/02 Trans., p. 86-92, APX. p. 104a-110a). Mr. Ham then submitted a formal, written request under the Michigan Freedom of Information Act, MCL 15.231 *et. seq.*, for a copy of all the bids submitted and, under separate cover, an explanation of the origin of the funds spent on the office furniture/equipment. (OPG's 2/5/01 ltrs., APX. p. 194a). BHK responded that it was a private, non-profit corporation, not subject to the MFOIA. (2/5/01 BHK's ltrs to OPG, APX. p. 116a). Consequently, OPG's attorney contacted BHK with a similar request, which was also denied. (OPG's 2/23/01 ltr, APX. p. 117a). Several months later, another request was made directly to the HHS. (OPG's ltr. to HHS' FOI Director, 8/03/01, APX. p. 199a).

But BHK's Executive Director believed that Congress had not intended for any disgruntled bidder or member of the general public to review these private documents. (10.15/02 hrg., p. 88-89, APX. 106a-107a). Any such request at its public meetings would have been denied. (Id.) Based on his years of experience with BHK and the HHS regulations, he knew that the proposed amount of each bid was publicly announced, but no one would have been permitted to inspect the entire contents of the bids submitted. (10/15/02 hrg., pgs. 84, 87-88, 120-122; APX. p. 102a-107a; 138a-140a). Although the Director did equivocate on what could be reviewed at the meetings, his position is that BHK is not required to disclose its private records under 42 USC 9839(a). (APX. p. 106a-110a; 130a-131a).

In April, 2001, OPG filed a lawsuit demanding a complete copy of all the bids under the MFOIA. (APX. p. 1a). Although no formal request under "federal legislation" was sent, OPG relied on 42 USC 9839(a), which states:

Each Head-Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, and free of any taint or partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency and other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.... (Am.Comp., ¶4 7, APX. p. 6a-7a).

During the discovery process, a substantial amount of BHK's financial information was given to OPG, including BHK's procurement policy, its Financial Procedures Manual, Audits, and Answers to Interrogatories. (APX. p. 237a, 201a, 30a). The explanation of its fund allocation was:

7.) More than three-quarters (3/4s) of BHK's funding is from federal, not state sources (86% federal; 14% state).

8.) Complete, independently audited Combined Statements from 1998 and 1999, and an internally audited statement for 2001 have been provided to OPG which detail BHK's income, respectively, as follows:

Federal	State	Total
\$1,642,277.00	\$ 696,242.00	\$4,420,812.00
\$3,244,976.00	\$ 771,857.00	\$5,216,982.00
\$3,472,570.00	\$1,411,862.00	\$7,410,196.00

The percentage of state funding in relation to federal funding is 25%.

The percentage of state funding in relation to total revenues is 14%.

(BHK received no funds through local authorities.) (Ex. Dir. Aff., APX. p. 54a).

In response to the parties' inquiry, the HHS Program's Officer advised BHK that the HHS regulation, 45 CFR 1301.30, required disclosure of only general information, not "specific information or details about who you selected or did not select as a supplier". BHK must disclose only its procurement policy. Further, he opined that BHK was not subject to the FOIA. (9/28/01, F. Marfia's Ltr., APX. p. 221a).

On April 4, 2002, the Director of the Office of FOI/Privacy Acts Division responded to OPG's FOIA request. (R. Cirrimcione's ltr to OPG, APX. p. 228a). She also directed BHK to provide only a copy of the procurement policy. (R. Cirrimcione 4/25/02 ltr to BHK, APX. p. 229a). On May 22, 2002, the Director of HHS' Family and Child Development also advised Congressman Stupak and the parties that the term, "reasonable public access" in 42 USC 9839(a) required disclosure of BHK's procurement policy only. (K. Willmoth ltr. APX. p. 230a). The HHS' Regulation reads:

Head-Start agencies and delegate agencies shall conduct the Head-Start program in an effective and efficient manner, free of political bias or family favoritism. Each agency shall also provide reasonable public access to information and to the agency's records pertaining to the Head-Start program. 45 CFR 1301.30.

The trial court disregarded BHK's disclosure policy, even though it was sanctioned by the HHS, and found §9839(a) ambiguous allowing the court to broadly construe the words "reasonable public

access” to afford a private cause of action, while simultaneously holding that the MFOIA did not apply. The trial court erroneously believed that OPG’s motivation for its demand for disclosure was based on the fact that OPG was the lowest bidder. (Transcript, Mtn for Prot Order, 9/14/01, p. 11, APX. p. 19a). OPG was not the lowest bidder, but as a matter of principle sought that information. (*Id.* p. 12-16, APX. p. 20a-24a).

The appellate court affirmed and justified its need to “interpret” the text of 42 USC 9839(a) because its language was ambiguous in that “reasonable minds could differ regarding the meaning”. (COA Op., p. 3, APX. 171a). Relying on its concurrent jurisdiction, it held, alternatively, that HHS’ interpretation was wrong, implied a private enforcement right, and agreed with the trial court’s construction of the term “reasonable public access” to include all financially-related documents because a portion of this private, non-profit corporation’s operations was sustained by the receipt of federal funds for its services. (COA Op. p.6, APX 174a).

BHK asserts that the state court should not have entertained this lawsuit and incorrectly interpreted §9839(a) to give the public broader powers than the FOIAs. (Op. p. 7, APX. p. 175a). Further, BHK objected to OPG’s failure to directly challenge the HHS’ implementation of “reasonable public access” with administrative action to obtain a definitive agency action and appeal it administratively, and later, seek a direct appeal to the federal court of that final agency action.

ARGUMENT

I. THE STATE COURT LACKS JURISDICTION OVER A DISPUTE UNDER 42 USC 9839(a) FOR REASONABLE PUBLIC ACCESS TO THE BOOKS AND RECORDS OF A PRIVATE, DELEGATED HEAD-START AGENCY RECEIVING FEDERAL FUNDS FOR ITS SERVICES.

A. A lack of jurisdiction may be raised at any time.

An agency's primary jurisdiction is not a "defense" that must be asserted in a responsive pleading in order to avoid waiver. The doctrine was created for consideration whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body, not for the convenience of the parties and the efficiencies attendant to adhering to the court rules. 8 *Michigan Pleading and Practice*, § 60:39.10.

Here, the issue of jurisdiction was raised by BHK, briefly addressed, and left undecided. (8/16/02 hrg., p. 55-60, APX. p. 71a-76a; Mot. to Compel, 4/1/02, p. 28-29, APX. p. 42a-43a). On appeal, jurisdiction was also discussed at oral argument. Subsequently, BHK filed a Motion with a Supplemental Brief arguing a lack of jurisdiction. Disagreeing, the court concluded that concurrent jurisdiction existed. (COA Op., p. 6, APX. p. 174a). It was raised in the Motion for Reconsideration.

B. Head-Start Regulatory Provisions.

The Head-Start Program is a federally funded program intended to promote school readiness by enhancing the social and cognitive development of low-income children. 42 USC 9831. The HHS Secretary is authorized to administer the program. 42 USC 9836(a). The Secretary promulgated the HHS regulations. 45 CFR 1301-1305. The general purpose and scope of the regulations is to allow "Head-Start programs be administered effectively and responsibly; that applicants to administer programs receive fair and equitable consideration; and that legal rights of current Head-Start grantees be fully protected." 45 CFR 1302.1.

The definition of a ‘Head-Start Agency or grantee’ means a local public or private non-profit agency designated to operate a Head-Start program by the responsible HHS official. 45 CFR 1301.2. An HHS official is an “official of the Department of Health and Human Services with authority to award grants. 45 CFR 1301.2. Conversely, a delegated agency is a public or private non-profit organization or agency to which a grantee has delegated all or part of its responsibility for operating a Head-start program. *Id.* BHK is not administered by a ‘responsible HHS official’, although it receives fees by contract for the services it provides to the HHS. But BHK’s procedures must comply with the HHS regulations requiring appropriate financial and administrative procedures and controls. 45 CFR 1301.12. The HHS’ Secretary issues regulations establishing performance standards and minimum requirements with respect to “health, education, parent involvement, nutrition, social, transition, and other Head-Start services as well as administrative and financial management, facilities, and other appropriate program areas.” 45 CFR 1304.1. Specifically, under 45 CFR 1304.3, the HHS oversees expenditure of federal funds:

“(D) The misuse of Head-Start grant funds.

- (ii) The loss of legal status or financial viability, as defined in part 1302 of this title, loss of permits, debarment from receiving Federal grants or contracts or the improper use of Federal funds; or
- (iii) Any other violation of Federal or State requirements including, but not limited to, the Head-Start Act or one or more of the regulations under parts 1301, 1304, 1305, 1306 or 1308 of this title, and which the grantee has shown an unwillingness or inability to correct within the period specified by the reasonable HHS official, of which the responsible HHS official has given the grantee written notice of pursuant to section 1304.61.”

The HHS has complete control over its programs, which extends to a review of procedures for applying for grants and receiving federal funds for major purchases, construction, and renovations to facilities.

45 CFR 1309.1. *et. seq.* A responsible HHS official evaluates the documents, costs, and approves expenditures under 45 CFR 1309.40.⁴

BHK must abide by the HHS regulations imposing standards for “organization, management and administration.” If BHK does not comply, it may lose its contract for failing to meet “established program and fiscal requirements.” 42 USC 9836(c). According to the HHS regulations, BHK must participate in an annual audit of its expenditures under 45 CFR 1301.12⁵, which is performed by an independent auditor, as defined in 45 CFR 1301.2, to determine if the agency’s financial statements are accurate, comply with the terms and conditions of the grant, and to determine “whether appropriate financial and administrative procedures and controls have been installed and are operating effectively.” 45 CFR 1301.12. BHK must keep accurate records. 42 USC 9842. Ineffective or improper use of federal funding is subject to a loss of funding. 45 CFR 1303.10. The HHS’ rules and regulations, and its implementation of them, may be challenged. 42 USC 9841. The regulation, 45 CFR 16, Part A, explains what disputes the Board of Review will consider. Under 45 CFR 16.7, the Board decides whether the appeal procedures are available. See also 45 CFR 16.3. These substantive regulations are binding to the same extent as a statute. Community Action of Laramie Co v Bowen, 866 F2d 347, 353 (CA 10, 1989).

C. The state court lacks jurisdiction over the ‘reasonable public access’ dispute because the federal agency has sole discretion of that dispute.

⁴The HHS regulations are also limited by other regulations controlling non-profit organizations under 45 CFR 74.1 *et seq.* and 45 CFR 92, administrative requirements for subawards to State, local and Indian tribal governments.

⁵An independent auditor is an accountant or the firm that is sufficiently independent of the agency being audited to render objective and unbiased opinions. 45 CFR 1301.2.

Exclusive federal jurisdiction exists by virtue of an express provision in the federal statute⁶ or “by the incompatibility in its exercise arising from the nature of the particular case.” De-Wayne Residential Center v Michigan Dept of Social Services, 80 Mich App 137, 141; 263 NW2d 315 (1977), citing Clafin v Houseman, 93 US 130, 136; 23 L Ed 833 (1876), quoted in Charles Dowd Box Co Inc v Courtney, 368 US 502, 507; 82 S Ct 519; 7 L Ed 2d 483 (1962). (exclusive federal court jurisdiction of SSI review hearings under 42 USC 1383(c).)

No exclusive-jurisdiction provision exists in the text of the HHS statute, Title 42 USC 9831 *et. seq.*. Rather, its expansive regulatory scheme evidences Congressional intent that the HHS exercise its sole discretion over its administration of local Head-Start agencies through its regulations. Express authorization to engage in rule-making is a very good indicator of an intent to delegate and afford due deference to an agency. United States v Mead Corp, 533 US 218, 229; 121 S Ct 2164; 150 L Ed 2d 292 (2001).

The judicial review, if any, of an agency’s decision is not permitted by an independent action, but only under the Administrative Procedure Act, “APA, 5 US 701 *et. seq.*, or 5 USC 704 *et. seq.*

- (a) This chapter applies, according to the provisions thereof, except to the extent - . . . (2) agency action is committed to agency discretion by law. 5 USC 7601(a)(2).

In Heckler v Chaney, 470 US 821; 105 S Ct 1649; 84 L Ed 2d 714 (1985), prisoners petitioned the Food and Drug Administration (“FDA”) seeking enforcement of FDA rules and demanding that the drugs used for implementing the death penalty undergo the same testing as any drug for human

⁶Exclusive jurisdiction exists in security cases under 42 USC 78a. Goodbody & Co v Penjaska, 8 Mich App 64; 153 NW2d 665 (1967), app dism’d; 393 US 16; 89 S Ct 47; 21 L Ed 2d 15, cert. den.; 393 US 971; 89 S Ct 390; 21 L Ed 2d 387, rehearing den (1968). Federal courts have exclusive jurisdiction over improper expenditures of federal funds under 31 USC 3730. Jurisdiction of a Federal Freedom of Information Act claim, 5 USC 552, rests solely with the federal courts.

consumption. But Heckler held that the agency's decision not to take enforcement action was presumed to be immune from judicial review under 5 USC 701(a)(2):

For good reasons, such a decision has traditionally been “committed to agency discretions,” and we believe that the Congress enacting the APA did not intend to alter the tradition . . . in so stating, we emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agencies to follow in exercising its enforcement powers. Heckler, supra. 470 at 823.

In Gillis v HHS, 759 F 2d 565 (CA 6, 1985), residents, relatives, and health-care professionals claimed that the HHS failed to adequately monitor and enforce regulations against several hospitals that had failed to fulfill their responsibilities. Although the association had standing, the court implied no private cause of action under the Hill-Burden Act⁷ to compel HHS to investigate, ascertain, and effect compliance with the Act. Further, any review under 5 USC 701 *et. seq.* was unavailable. As in this case, the Hill-Burton Act involved enforcement of a federal mandate for “public access” to its program, 45 CFR 124.510 and 511, under its record maintenance requests:

- (1) A facility shall maintain, *make available for public inspection* consistent with personal privacy, and provide to the Secretary on request, any records necessary to documents its compliance requirements of this subpart in any fiscal year, including documents from which information required to be reported under paragraph (a) of this section was obtained. 45 CFR 605(b). (emphasis added.)

Relying on the four-factor test in Cort v Ash, 442 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975), the Gillis Court precluded judicial review under the APA where the agency was authorized to exercise its discretion:

Whether a particular agency decision is committed to agency discretion depends, broadly speaking, on whether there is law to apply in making and reviewing the decision, which in turn depends, we have said, on “pragmatic considerations as to

⁷42 USC 300s-6

whether an agency determination is the proper subject of judicial review.” *Natural Resources Defense Council, Inc. v SEC* 606 F3d 1031, 1043 (D.C. Cir. 1979). Among the important considerations are “the need for judicial supervision to safeguard the interests of the plaintiffs[,] the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role[,] and the appropriateness of the issues raised for judicial review.” *Id.* at 1044. *Gillis*, 759 F 2d at 576.

Consequently, BHK submits that the text of §9839(a) unambiguously operates as a general guideline and policy-making statement for the HHS. It requires the development of minimum administrative standards and requirements for Head-Start agency - as developed by the HHS. The provision does not provide substantive or detailed standards for the HHS or its agencies to follow. Rather, this provision unequivocally leaves that task to the HHS and its agencies. As a practical matter, the agencies are involved in the day-to-day operations and implementation of the substantive goals. They are the best candidates to understand what is necessary to serve both the public and recipients.

This interpretation is supported by the surrounding statutory provisions and comprehensive regulatory provisions developed by the HHS. The HHS’ authority and mandate requires it to draft regulations to direct its Head-Start agencies’ administration, which includes defining what is “reasonable public access.” Here, the three HHS’ officials in four separate correspondences to the parties explained what was “reasonable public access” in the context of a delegated or Head-Start agency’s purchases. (APX, p. 221, 228a - 230a.) Because Congress delegated to the HHS the task of developing standards of administrative conduct consistent with its program goals, these position letters, rulings, or orders, which bind BHK, should bind the courts. The judiciary should exercise extreme caution before interfering with an agency’s authority or extensive regulatory system. Random state-court decisions may conflict with each other or the agencies’ decisions and undermining the HHS and individual programs’ ability to meet program goals in ways not contemplated by the judiciary.

Consequently, the lack of clarity in the rules and a lack of uniformity in their implementation on a state-by-state, court-by-court basis will interfere with, if not possibly defeat, the HHS' authority.

Moreover, the lower courts' broad construction of §9839(a) has far reaching, unanticipated implications that can only be addressed by legislative policy-making considerations. For instance, it impacts all different types of organizations, including YMCAs, churches, and religious-based organizations. The state-court decisions will impact future disclosure of confidential material, staffing, property and equipment acquisition, hiring decisions, and other areas impacting that private enterprises' operations heretofore thought of as inaccessible. The issue concerns not only what materials are available to the public, but from what organization and to what degree the public can invade the privacy of that particular organization. The policy concerns may vary depending upon the nature of the documents requested, the type of organization, and the goals of the program. This being a policy-making and discretionary decision, it is a task best left to Congress, who appointed the job of regulating the dissemination of information of these facilities and the types of information that must be disclosed to the HHS.

Part of the HHS's mandate included the incorporation of its "public access" requirement into its program, which it has done through its role in the independent auditing and enforcement provisions of the HHS statute, 42 USC 9842 and 42 USC 9836, and its rules and regulations in 45 CFR 1304. The HHS is the watchdog, not the public. In Gillis, a decision allowing public access for enforcement of agency regulation by private parties was reversed to avoid making courts the watchdogs of federal agencies.

Judicial intervention in such decision-making through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in

policymaking that the discretionary function exception was designed to prevent. 467 U.S. at ___, 104 S.Ct. at 2768, 81 L. Ed. 2d at 678. Similar concerns were noted by the Court in *ICI*. In holding that the FDIC's declining to decide the merits of ICI's petition requesting that the agency declare a plan to sell mutual fund shares unlawful, was not reviewable under the APA, the court noted the extent of the FDIC's regulatory responsibilities and credited the agency's assertion that the exercise of those responsibilities "would be severely disrupted if every person seeking FDIC action on a petition seeking enforcement action could invoke judicial review of a simple FDIC refusal to consider the merits of the petition." 759 F 2d at 577.

Adopting the reasoning in the Council of and for the Blind of Delaware County Valley Inc v Regan, 709 F2d 1521 (DC Cir., 1983) (*en banc*), judicial supervision of an agency was discouraged:

The Court reasoned that broad declaratory and injunctive relief against the government would place the court in the position thereafter of "supervis[ing] the ORS's handling of virtually every alleged violation" of the Act, that it was doubtful whether such an approach would be more effective than several private suits, and that "it would empower one district judge to act as supreme supervisor of the ORS's enforcement activities - - - a role more appropriately reserved for the Executive under the oversight of Congress." *Id.* The reasoning is equally applicable in the instant case. Neither inconvenience nor a speculative disincentive to entity compliance render resort to the private suit remedy available to enforce Hill-Burton assurances inadequate. Gillis, 759 F 2d at 578.

42 USC 9839(a) precludes judicial review because it does not expressly provide for an appeal or judicial review from its decisions effectuating the administrative provision. The purpose of 42 USC 9839(a) is to act as general mandate to the HHS to develop its administrative guidelines and regulations, which exist currently in 45 CFR 1301, *et. seq.* It authorized neither state nor federal courts to act as watchdogs of § 9839(a), a purely administrative provision. To the contrary, Congress directed the HHS, within its sole discretion, to regulate its program administration, to set administrative standards and enforce them. The text of 42 USC 9839(a) lacks any indicia of an intent to trigger judicial review of the HHS regulations. This provision is silent and fails to contain any substantive standards that dictate what the specifically is required other than a general statement that "reasonable public access" was required. But this broadly worded policy statement is to be developed, implemented, and enforced by

the HHS, based on its understanding of its primary, substantive goals of the head-start program. Generally, the statute contains no provision for private enforcement and this provision omits such a remedy. Thus, no permissible judicial review is authorized where the administrative provisions were intended to benefit only the HHS's ability to regulate its program. Narrowly read, judicial review by appeals to the HHS Secretary and Board of Review is permitted from the termination or suspension of assistance are permitted within a period deemed reasonable by the Secretary. 42 USC 9841(a)(1).

In Madison-Hughes v Shalala, 80 F3d 1121 (CA 6, 1996), the federal district court's dismissal for lack of subject-matter jurisdiction was affirmed where plaintiff claimed that the HHS must collect racial data on the patients of health-care providers that received federal assistance under the regulation promulgated under Title VII of the Civil Rights Act of 1964, 42 USC 2000(d) and its general purpose regulation, 45 CFR 80.6, which states:

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (hereinafter referred to as the "Act") to the end that no person in the United States shall; on the ground of race, color or national origin, be excluded from participation in, be denied the benefits, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health and Human Services.

In Madison, the regulation, which contained no meaningful standards, left the collection of data to the HHS' discretion. Thus, the court could not indirectly regulate through the broadly-worded statute. Instead, the agency must establish its policies, prioritize its goals, and enforce its regulations at its discretion, consistent with the statutory purpose.

Even in the administrative appeal context, judicial review of some agency decisions can be precluded. In Community Action of Laramie Co v Bowen, *supra*, a non-profit organization sought review of an administrative decision upholding termination of a funding grant. An appeal was taken

asserting that the Commissioner's final decision was arbitrary, capricious and in excess of the agency's authority constituting an abuse of discretion. Relying on Heckler, supra, the federal appellate court found the subject-matter jurisdiction was lacking. "Because neither Congress nor HHS itself . . . has promulgated substantive guidelines for the agency to follow when deciding whether to terminate a grant or impose a lesser sanction for a violation of the rules, there is no law to apply." Id., 866 F 2d at 354.

42 USC 9839(a) does not expressly contain guidelines or a direct right to appeal administrative-type decisions. OPG neither named the HHS as a party nor appealed the HHS' decision. But if the HHS' decision is not reviewable, it is more compelling that the OPG may not indirectly seek relief or an appeal from the HHS through BHK. The HHS did not initiate any enforcement action against BHK, but concurred with and guided BHK's acts. Their respective positions were consistent with the authorized HHS officials' interpretation of its regulations. BHK must comply with HHS' standards.

Conversely, the state-court decision conflicted with the HHS' interpretation. The exercise of state-court jurisdiction was an impermissible, indirect review of the federal agency's actions, and undermined the Legislature's grant of sole discretion to the HHS. For this very reason, state-court jurisdiction should not extend to this case. The state court cannot act as the ultimate arbitrator.

The appellate court touched upon this issue, but concluded that no definitive HHS decision was made. (COA Op. p. 9-10, APX. p. 177a-178a). Yet, even "relatively informal interpretations by HHS have been given some presumption of correctness," Chambers v Ohio Dept of Human Services, 145 F3d 793 (CA 6, 1998), cert den 525 US 964 (1998), citing Schweiker v Gray Panthers, 453 US 34, 43; 101 S Ct 2633; 69 L Ed 2d 460 (1981). See also Elizabeth Blackwell Health Ctr for Women v Knoll, 61 F3d 170, 182 (CA 3, 1995), cert den 516 US 1093; 116 S Ct 816; 133 L Ed 2d 760 (1996), stating that "deference is appropriate here even though the secretary's interpretation is not contained in a

legislative rule.” BHK asserts that the HHS’ administrative decision was sufficiently definitive. All three HHS officials agreed, all of whom control BHK’s operations to the extent it desires to provide services to the HHS. Because this general administrative guideline affords the HHS sole discretion, judicial review of any kind of the local or national agency’s implementation of § 9839(a) is unavailable.

D. The Chevron Doctrine requires the state courts to defer primary jurisdiction⁸ to the federal agency.

In Rinaldo’s Construction Corp v Michigan Bell, 454 Mich 65; 559 NW2d 647 (1997)⁹, the relationship between courts of general jurisdiction and the primary jurisdiction of a state agency was examined. It held that, although the circuit court may entertain a cause of action in tort in the circuit

⁸The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. ‘Exhaustion’ applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. ‘Primary jurisdiction,’ on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. US v Western Pac R Co, 352 US 59, 63-64; 77 S Ct 161, 165; 1 L Ed 2d 126 (1956).

⁹The doctrine of primary jurisdiction originated in the decision of the Supreme Court of the United States in *Texas & P.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907). In that case, a shipper sued a carrier alleging that the carrier had charged an unreasonable rate. The question was whether a state court could properly rule on the matter absent prior review of the rate by the Interstate Commerce Commission. The commission had been established by an act, the purpose of which was to assure that rates charged by carriers were uniform and reasonable. Carriers would file their rates with the commission, and the reasonableness of those rates could be challenged in proceedings before the commission. Although the act creating the commission stated that it did not abolish the common-law right to challenge such rates in court, the Supreme Court concluded that preliminary resort must be to the Interstate Commerce Commission if the purpose of obtaining uniform rates were to be effectuated. Attorney General v Diamond Mortg Co, 414 Mich 603, 612; 327 NW2d 805(1982)

court, the primary jurisdiction of the state agency requires state-court dismissal where the claim is based solely upon the contractual relationship between the defendant and the regulatory agency.

BHK argues that the primary jurisdiction of the federal agency, the HHS, likewise precludes the exercise of state-court jurisdiction over this dispute against a delegated Head-Start agency for disclosure of business records, including private, third-party bids submitted for BHK's purchase of office furniture.

Subject-matter jurisdiction is not subject to waiver because it concerns a court's "abstract *power* to try a case of the kind or character of the one pending" and is not dependent on the particular facts of the case. *Campbell, supra* at 613-614, 455 NW2d 695 (emphasis added); see also *Harris v Vernier*, 242 Mich App 306, 319; 617 NW2d 764 (2000). A court either has, or does not have, subject-matter jurisdiction over a particular case. *Bowie v Arder*, 441 Mich 23, 39, 490 NW2d 568 (1992). Primary jurisdiction, on the other hand, is not subject to waiver because it is determined, not by a right to which the parties are entitled, such as an affirmative defense that may be waived by a party's failure to assert it, but rather by prudential considerations concerning respect for the relationship between the court and the administrative agency, and the nature of the claims being addressed. It may be raised *whenever* a dispute can more appropriately be resolved by the administrative agency with authority over such claims. *Rinaldo's, supra*, at 72, 559 NW2d 647. Thus, a determination of waiver in the case of primary jurisdiction does not depend on whether the doctrine is similar or dissimilar to subject-matter jurisdiction. *Travelers Ins Co v Detroit Edison Co.*, 465 Mich 185, 204; 631 NW2d 733, 744 (2001).

Primary jurisdiction is a concept of judicial deference and discretion. LeDuc, *Michigan Administrative Law*, § 10:43, p. 70. The doctrine exists as a "recognition of the need for orderly and sensible coordination of the work of agencies and of courts." *Rinaldos Construction Corp, supra*, 454 Mich at 70. In *Dominion Reserves, Inc. v Michigan Consol Gas Co*, 240 Mich App 216, 220; 610 NW2d 282 (2000), the factors for determining whether the circuit court will defer to the agency were given as:

First, a court should consider the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. Second, it should consider the need for uniform resolution of the issue. Third, it should consider the potential that judicial resolution of the issue will have an adverse impact on the agency's performance on its regulatory responsibilities. Where applicable, courts of general jurisdiction weigh these

considerations and defer to administrative agencies where the case is more appropriately decided before the administrative body.

In Michigan Basic Property Insurance v Detroit Edison Co, 240 Mich App 524, 533; 618 NW2d 32 (2000), an insurance company attempted to recover for its payment on property damage. Because it was a tort claim for money paid out on a fire claim, the complexities of the regulatory scheme were not implicated and the circuit court accepted jurisdiction over the dispute.

Historically, the Michigan precedent construing primary jurisdiction began in Valentine v Michigan Bell Telephone Co, 388 Mich 19, 75-76; 199 NW2d 182 (1972), where the circuit court was asked to compel the company to provide adequate service, award damages, and declare its liability limits null and void as a violation of public policy. It held that any claim for damages arising out of a violation of the regulations or any action outside of the regulations (such as tort) by the agency would be presented to a court of general jurisdiction. Contractual claims were generally tied to the valid agency regulations and therefore, breaches or violations should be directed first to the Public Service Commission and then to the Ingham County Circuit Court. Although partially abrogated, its holding in Valentine survived in this Court's subsequent decision in Travelers, *supra*, 465 Mich at 208. There, this Court acknowledged the MPSC's significant expertise on its implementation of regulatory tariffs and whether to apply them to particular facts prevented judicial intervention. Not all tort claims against the utility would rest with a court of general jurisdiction. In Travelers, this Court concluded that the Commission had primary jurisdiction because the contract claims "were anticipated and controlled by the tariff", which involved factual determinations within the Commission's expertise.

Indeed, it has been noted that [t]he primary jurisdiction doctrine is another form of judicial restraint. It is more complicated than the political question doctrine because it involves congressional delegation of discretion to an agency. It will arise when Congress has passed a statute regulating an area under the supervision of an expert administrative agency whose supervision involves factual determinations aided by the special expertise

of the agency. Once the agency has acted, the court must determine the extent to which it will defer to that special expertise or review the agency's action." [*Good Fund Ltd. v. Church*, 540 F.Supp. 519, 546 (D.Colo.1982), rev'd sub nom *McKay v. United States*, 703 F.2d 464 (C.A.10, 1983).] The circuit court noted that judicial resolution of the issue could adversely affect the regulatory responsibilities of the MPSC. See, *Diamond Mortgage, supra* at 613, 327 N.W.2d 805. The circuit court's reasoning was consistent with the rationale set forth by this Court in *Rinaldo's, supra* at 71-72, 559 N.W.2d 647. It thoroughly considered the issue in light of the requisite agency expertise, the necessity for uniform resolution of the issue underlying the dispute, and the effect of a judicial, rather than an administrative, resolution. *Travelers*, 465 Mich at 210.

Likewise, in the case before the court, the enforcement of "reasonable public access" is mandated by the federal statute, 42 USC 9839(a), and implemented by the HHS regulation, 45 CFR 1301, *et. seq.* It is clear from the statutory scheme that the HHS was intended to have jurisdiction over this type of discretionary, administrative action. 42 USC 9836a(1)(C). HHS's regulations direct procurement policies in conjunction with Uniform Administration Requirements. 45 CFR Part 74.10, *et al.* Under 45 CFR 74.44(a)¹⁰, the Procurement Policy Section, head-start agencies must avoid the purchase of unnecessary items and the solicitation of bids for goods and services. The HHS can request preapproval of purchases where it has found that the "recipient's procurement procedures or operations do not comply with its procurement standards or if the amount of the small purchase exceeds the fixed threshold, 41 USC 403(11), currently \$100,000.00. 45 CFR 77.44(d)".

The question of what is "reasonable public access" may vary depending upon the facts, and as such should be left to the agency's discretion so the outcome is uniform and consistent with agency goals. Primary jurisdiction should rest with the HHS because the failure to do so may create an imbalance in its administration. OPG's claim against BHK arises out of the contractual relationship

¹⁰[59 FR 437060, Aug. 25, 1994, as amended at 61 FR 11747, Mar. 22, 1996; 62 FR 41878, Aug. 4, 1997; 62 FR 51377, Oct. 1, 1997].

between BHK and HHS, and allegedly BHK's violation of that relationship by its failure to comply with administrative standards as created by the HHS. These standards are governed by comprehensive regulations and detailed requirements for procurement policies based upon the HHS's authority and expertise in controlling the expenditure of federal monies by local non-profit organizations, Institutions of Higher Education, Hospital, Commercial Organizations, and Grants and Agreements with States and Local Governments and the Indian Tribal Governments. The development of these administrative standards is founded upon the HHS' expertise of how to balance the practical needs of the worthy organizations with their respective substantive duties to fulfill the central purpose--to serve the disadvantaged. The HHS is mindful of how its regulations advance and serve its purpose and program goals. Such dispute directly impact and can interfere with the HHS' administrative goals and regulations. Its expertise with the overall program is not possessed by local courts. What and why procedures are in place, how they are intended to interrelate, and their rationale is with an agency's discretionary decision. The HHS has the expertise to develop a review process in a manner consistent with its goals.

In addition to its vast, cumulative administrative experience, the HHS had to develop these administrative requirements with the substantive goals of the program in mind, which involves policy considerations that are best left to the agency and trigger the separation of powers doctrine expressed in Travelers, 465 Mich at 196-197. As required when developing the FOIAs, the Legislature spent considerable resources investigating the issues, considering the multitude of conflicting interests, and understanding the practical operations and the procurement regulations currently in place before generating its regulatory scheme. The administrative and management framework had to be developed concurrently with its development of the substantive goals of the Head-Start program.

Clarity and uniformity in the application of its rules and requirements is critical to efficient and effective administration, which is one of the expressed goals stated in 42 USC 9839(a), that is to promote efficient and effective programs for the disadvantaged. Efficiency in administration of any program is lost if a rule is not substantively and uniformly applied. Allowing local personalities to impact the determination of what is “reasonable public access” causes disruption, confusion, and distraction from an efficient and effective servicing of the program’s substantive goals. The state-by-state court or the general public’s micro-management of the local facility diverts its time and energy away from serving its substantive goals and prevents it from being responsive to the recipients’ needs. This case presents a prime example of bad public policy where the lower courts’ decisions contradict the HHS officials’ positions without an explanation of why the HHS official was wrong. Attacks on the local agency or the HHS agency itself on matters that do not relate to the substantive goals of the program could not have been intended by Congress. It is bad public policy to place BHK in conflict with its regulatory agency, which is what occurs when OPG, through the back door, seeks a state-court order requiring BHK to either ignore or disobey the HHS’ instructions. The possibility of such a direct conflict must be avoided where the HHS was not confronted completely or directly. Another layer of review is unnecessary, cumbersome, and compromises HHS’ statutory authority. Here, the appellate court ruling was not confined to this fact situation. Potentially, it has much broader implications reaching all local, private facilities’ records until or unless otherwise limited on a case-by-case basis. 42 USC 9839(a) was so broadly construed that it reaches any organization’s records, even these which were not shown to have originated from head-start funds for a head-start purpose. The purchase of office furniture was a “general fund” type expenditure. 42 USC 9839(a), as a head-start provision, cannot be used a tool to access records that pertain to funding outside of the head-start statute.

Under Travelers, supra, the determination of whether to defer to the HHS' primary jurisdiction must be made if the state court accepts concurrent jurisdiction, as the appellate court did in this instance. The Chevron Doctrine is thus triggered, and requires that the state court defer to the federal agency's interpretation of its regulation and the statutory provision unless the court can explain how that agency's decision was clearly wrong. BHK submits that the lower court decisions can be reversed because it failed to give sufficient due deference to the HHS' decision.

Rather, the appellate court disregarded the four letters from three separate HHS officials - dismissing them as not being "definitive" on the matter. Yet, each letter concurred with the substantive merits of the other letters. For purposes of federal administrative appeals, 5 USC 701 or 5 USC 704, letters can be sufficiently definitive to constitute agency action. Where an agency's actions constitute a "failure to act, it is reviewable 5 USC 551(13). OPG did not obtain the relief it sought from BHK or the HHS. The HHS' inaction or failure to compel BHK to disclose is coommensurate with an agency's denial of relief. Under 5 USC 704 *et. seq.*, the term 'agency action' is broadly defined to include a 'denial of relief.' In Ciba-Geigy Corp v USEPA, 801 F2d 430, (CA DC 1986) a letter by the Director of Pesticides Program unequivocally stated the agency's position and constituted a final decision for a federal district court's review of the administrative action. In Faircloth v Family Independence Agency, 232 Mich App 391, 403; 591 NW2d 2d 314, 320 (1998), an unpromulgated policy constituted an agency rule only where the agency establishes policies and procedures under a broad grant of authority to administer a program. Simply, the appellate court erred in finding that the HHS' Directors' letters were not sufficiently definitive because each letter contained an unequivocal policy decision. See Franklin Fed Sav Bank v Director, Office of Thrift Supervision, 927 F2d 1332, 1337 (CA 6, 1991) (Chevron Doctrine triggers jurisdiction).

BHK objects to the refusal to consider the letters definitive and ignoring the presumption of their correction when it determined that the text of 42 USC 9839(a) as ambiguous. (COA Op., p. 7, APX. p. 175a). Contrary to the Chevron Doctrine, it would did not defer to the agency's interpretation of that provision and the HHS regulation, 45 CFR 1301.30. Instead, because it was ambiguous, the state court could interpret its language *de novo*, contrary to the Chevron Doctrine, which provides:

If the statute speaks clearly "to the precise question at issue," we "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843, 104 S.Ct. 2778. If the statute is instead "silent or ambiguous with respect to the specific issue", we must sustain the agency's interpretation if it is "based on a permissible construction of the statute." *Id.*, at 843, 104 S.Ct. 2778 . . . It was precisely Congress' command, however, that the ICC promulgate standards to govern the Single State Registration System, 49 U.S.C. § 11506(c) (1994 ed.), and it was thus for that agency to resolve any ambiguities and fill in any holes in the statutory scheme. Yellow Transp Inc v Michigan, 537 US 36, 45; 123 S Ct 371, 377; 154 L Ed 2d 377 (2002)¹¹.

Superficially, it held that HHS' interpretation was wrong because it failed to read the language, "reasonable public access" to mean that the 'public had a right to access' to BHK's records. (COA Op., p. 7, APX. p. 175a). All the while, it neglected to adequately explain why the HHS' construction of a "reasonable public access" was wrong. The HHS Program Officer's stated:

There is a Head-Start regulation (45 CFR 1301.30), however, that states "Each agency shall also provide reasonable public access to information and to the agency's records pertaining to the Head-Start program." We understand this to mean that you must provide general information to public inquiries such as copies of your written procurement procedures, but not the specific information or details about who you selected or did not select as a supplier. We are therefore asking you to send to Mr. Daavettila a copy of your written procurement procedures. (Frank Marfia's 09/01 ltr. APX. p. 221a).

The Office of Public Affairs of the HHS' Director for for the FOI/Privacy Acts Division opined:

¹¹ Subsequently, the Supreme Court remanded it to the Court of Appeals to consider other issues that had been preserved. Yellow Transp, 468 Mich 862, 659 NW2d 229 (2003). (On Remand) 257 Mich App 602, 669 NW2d 553 (2003), lv den. ____ Mich ____; 669 NW2d 331 (2004).

As confirmed in our March telephone conversation, BHK is not subject to the records access requirements of the Federal Freedom of Information Act. That statute applies only to records in the possession of the Federal Executive Branch and certain of its agents. Being a grantee of the Federal Government does not make one a part of the Executive Branch. Therefore, BHK is not subject to the FOIA. You, of course, are bound by any provisions incorporated into the grant language regarding your obligations to make information concerning your activities available to the public. If my understanding that BHK, at the request of the Administration for Children and Families (ACF), has already complied with the requirements of the grant regarding dissemination of information about your procurement policy. (R. Cirrincone's ltr, 04/02 APX. p. 229a).

Lastly, Director for the Office of Family and Child Development, Kay Willmoth, restated:

When this issue first came to our attention several months before an inquiry was sent to your office, we advised the grantee to provide a copy of the agency's procurement procedures, to the client of Tercha and Daavettila. These procedure were provided and, by doing this, we believe the grantee acted reasonably. We, therefore, find that the grantee is under no further obligation under the Head-Start Act and regulations to provide documents with specific commercial information they received through the competitive process. (K. Willmoth 05/02 ltr, APX. p. 230a).

Failing to pay proper respect to the HHS' interpretation of 42 USC 9839(a), the appellate court improperly interpreted the provision affording it significantly more power than the FOIAs. It failed to appreciate that "reasonable" public access, by definition, is limited. The appellate court improperly supplanted its opinion without any recognition or appreciation of the administrative agency's authority. If that approach were permissible, administrative agencies would become dysfunctional. The lack of a definition of "reasonable public access" does not give a state court *carte blanche* to define the terms based upon a case-by-case analysis of the facts of each dispute presented to that state-court judge. Yellow Trans., supra.

The result also conflicts with the lack of authority of a right to access the records of a non-profit, private corporation authorized to operate under the business statute, MCL 450.2101 *et. seq.* It is contrary to the philosophy of the FOIAs. BHK is not a public body primarily funded by the state

government. (SD Order, p. 2, APX. p. 167a). The expenditure at issue was not directly related to Head-Start funding and carries the potential for a broader exposure of information than anticipated by the lower courts opinion. Thus, the transformation of BHK, a private non-public entity, into a public entity by virtue of this general administrative statement in 42 USC 9839(a) is wrong. Allowing a member of the public to demand complete copies of bids submitted by private companies to a non-profit organization was not contemplated under § 9839(a). To construe § 9839(a) so broadly permits extensive discovery of BHK's financial records and documents not yet contemplated by this case. The ramifications of such a broad access policy opens the flood gates to litigation for disclosure of records or documents yet not contemplated, even under the guise of a FOIA request. (Financial records, APX. p. 53a, 85a-86a, 237a). It is best left to the Congress, if not the HHS, to decide what must be disclosed because of the significant policy considerations triggered by the current holding in this case. The state court should defer to the federal agency's primary jurisdiction.

E. The state court lacks jurisdiction because OPG failed to seek a final decision from the federal agency on its interpretation of 42 USC 9839(a).

Alternatively, BHK asserts that if a 'definitive agency decision' was not given, then OPG's failure to exhaust administrative remedies deprives a court of subject-matter jurisdiction. Blair v Check Cab Co, 219 Mich App 667; 558 NW2d 439 (1996). In Crocker v Tennessee Secondary School Athletic Ass'n, 873 F2d 933, 935-36 (CA 6, 1989), the benefits of the exhaustion of administrative remedies before bringing a suit was noted: the agency applies its expertise, develops facts, promotes efficiency, and protects the integrity of the administrative process. In Electro-Tech, Inc v H.F. Campbell Co., 433 Mich 57; 445 NW2d 61 (1989), the plaintiff failed to complete the application

process and failed to obtain a final decision from the city as to how the property could be used. A final decision by the city could not be made because the process was not complete. The claim was not ripe.

In Michigan Administrative Law, § 10:21, pg. 762-763, Dean LeDuc discussed the crucial element of finality and whether the agency had taken a definitive position. Where agency action has not yet been completed, dismissal is appropriate, Id, relying on Wortelboer v Benzie Co, 212 Mich App 208; 537 NW2d 603 (1995). (additional steps required):

“As a general matter, two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decision making process - - it must not be of merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. “ *Bennett v Spear*, 520 U S 154, 177-78, 117 S Ct 1154, 137 L Ed 2d 281 (1997) (internal citations omitted); *see also Harris v FAA*, 353 F3d 1006 (D.C. Cir. 2004). National Head-Start Association (NHSA) v Department of Human and Health Services, 297 F Supp 2d 242 (2004).

In Brown v HHS, 46 F3d 102 (CA 1, 1995), applications for welfare benefits were denied because the value of the applicant’s vehicle exceeded the permissible assets level of \$1,500.00. Although exercising its discretionary review of the substantive issues, the court commented that the applicants’ appropriate remedy was to petition the HHS Secretary for an amendment to the \$1,500.00 exemption because it involved review of factual and policy issues within the HHS’ primary jurisdiction. Brown, 46 F2d at 113-114. Relief from a ‘perceived’ injury is not permitted.

In Pharmaceutical Manufacturer’s Assoc v Kennedy, 471 F Supp 1224 (D CT Maryland, 1979), the proposed release of a drug list price guide¹² by the Food and Drug Administration (“FDA”), did not

¹²In Pharmaceutical, the court commented that no difference existed between the release of information as compared to the refusal to release information for the purpose of agency action. In either instance though, the action is reviewable under the APA because the agency action would have an adverse effect upon the party and thereby entitle him to judicial review. Pharmaceuticals, 471 F Supp at 1229 citing Sears, Roebuck & Co v General Services Administration, 384 F Supp 996 D.C. Aff’d, 166 US App D.C. 194; 509 F2d 527 (1974).

constitute “agency action” because this was a *proposed*, rather than a formalized action by the FDA. The term, presence of “agency action,” as that term has been defined under 5 USC 702 and 5 USC 704 through 5 USC 551(13), includes: “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act,” did not occur. Having no final decision, the injury was mere speculation.

OPG argued, and the lower courts agreed, that the HHS officials’ letters were not a final agency decision. If so, OPG had the burden to seek a “final decision” or definitive position before challenging the informal actions indirectly. Jeffrey v Rapid American Corp, 448 Mich 178, 184; 529 NW2d 644 (1995). OPG did not attempt to have the trial proceedings stayed or dismissed without prejudice until a final decision was obtained. Also, OPG did not name HHS as a party under MCR 2.205 despite OPG’s acknowledgment of HHS’ control, as shown by its direct contact with HHS and the HHS Responses. OPG admitted that the letters to and from the HHS were OPG’s utilization of the agency’s administrative internal process. (8/16/02 hrg., pgs. 55-60, APX. p. 71a-76a). Nonetheless, OPG failed to file any petition, formal complaint, or appeal within the HHS. If OPG failed to complete the HHS process, then OPG’s claim must be dismissed. It cannot have it both ways by first, not seeking a final agency decision or following administrative procedures within the HHS, and then complain that the letters are not final decisions. If the HHS had decided with OPG, then BHK would have had to challenge the decision within the agency to the Board of Review or by petition to the Secretary. 42 USC 9841. Thus, OPG’s claim should have been dismissed because, if no definitive agency action was given, OPG did not exhaust its administrative remedies. The lower courts should have declined to consider a dispute that was not ripe.

F. The state court does not have jurisdiction because OPG's remedy was to appeal to the federal district court under 5 USC 701 *et. seq.* or 5 USC 704 *et. seq.*

If the term, "reasonable public access" is a term of art capable of being judicially reviewed as it is applied on a case-by-case basis, the available remedy to HHS' interpretation lies with an administrative appeal to be filed in the federal district court.¹³ The HHS' decision on appeal must be affirmed unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with the law. 5 USC 706(2)(A). OPG's state-court lawsuit is essentially an indirect attack on the HHS' decision refusing to compel BHK to release those documents. It is bad public policy, if not a violation of the separation of powers, to have the state court compel BHK to disobey or ignore its regulatory body's directive, especially here where OPG did not challenge the HHS' interpretation directly. OPG cannot have it both ways by arguing that BHK is a head-start agency subject to 42 USC 9839(a), and then separate BHK out as a head-start agency as if it were not controlled by the HHS. OPG, as the petitioner and aggrieved party would have to proceed, if at permissible, under the Administrative Proceedings Act, "APA", 5 USC 701¹⁴ *et. seq.* or 5 US 704 *et. seq.*

In Harrington Trucking Inc v Iowa Dept of Trans Hwy Div, 526 NW2d 528 (Iowa, 1995), a review of a final administrative decision of the United States Department of Transportation decision to deny certification of a Disadvantaged Business Enterprise was justifiably not appealable to the state court. Likewise, the lower courts' decisions in this case should be reversed because OPG is the

¹³See Comm of Mass v Sullivan, 803 F Supp 475 (D. Mass. 1992). (The federal district court rather than a court of claims has jurisdiction over a commonwealth's claim that the HHS refused to reimburse the commonwealth for payments made into a pension reserve fund).

¹⁴5 USC 704 *et. seq.* review final aging actions "for which there is no other adequate remedy in a court."

aggrieved party due to its objections to the HHS letters and BHK's compliance with those letters. The failure to obtain or appeal BHK's and the HHS' decision is fatal to its state case.

II. BASED UPON THE PLAIN MEANING OF 42 USC 9839(a), DISCLOSURE OF ALL BIDS SUBMITTED FOR OFFICE FURNITURE WAS NOT REQUIRED BECAUSE IT DOES NOT APPLY TO DELEGATED HEAD-START AGENCIES, DID NOT AUTHORIZE A PRIVATE CAUSE OF ACTION FOR THE GENERAL PUBLIC, AND ANY PURPORTED PURPOSE TO PROTECT THE EXPENDITURE OF FEDERAL FUNDS IS SERVED BY THE HHS' AUDITING REGULATIONS.

A. The plain meaning of the statute supports the private, non-profit corporation's argument that it is under no duty to provide copies of its records and documents to any member of the general public or an unsuccessful bidder.

Statutory interpretation is a question of law for the courts. Dessart v Burak, 252 Mich App 490, 494; 652 NW2d 669 (2002). Courts may not speculate as to the probable intent of the Legislature beyond the plain meaning of the expressed language. Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219 (2002). When the plain language of the statute is clear, no judicial interpretation is needed or permitted. Guardian Photo, Inc v Dep't of Treasury, 243 Mich App 270, 277; 621 NW2d 233 (2000). The plain meaning of the words is the best measure of the Legislature's intent. Mayor of City of Lansing v Michigan Public Service Com'n, 470 Mich 154, 165-166; 680 NW2d 840, 847 (2004). Here, 42 USC 9839(a) states:

Each Head-Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, and free of any taint or partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency and other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.

BHK asserts that the plain meaning of § 9839(a) favors the lack of disclosure. Although it applies to BHK when BHK is characterized as a ‘head-start agency’, BHK is much more than a “head-start agency”. Head-Start is only 2 of BHK’s 17 programs. The plain language of the provision ties the public access to the authority or funds for which the head-start agency is responsible. But, here, the head-start portion of BHK is minimal. The purchase and the cost of office equipment or furniture tangentially relates to the receipt of any head-start payments from the federal government. Here, no allocation of the amount of head-start money was shown to be used for the general purchase. Extending the language of §9839(a) could inappropriately expand its reach into the private information of other sources of funds or revenue from other sources or programs, which are not governed by the language under §9839(a) and results in the disclosure of information about other, unrelated programs where the language addresses only head-start programs..

Even if it applies, it only requires that BHK must follow the standards that the HHS develops, which it did. Strictly speaking, § 9839(a) says that the head-start agency “shall observe standards...”. The mandate in § 9839(a) applies to an “head-start agency”, which is equated with a “grantee”. 45 CFR 1301.2.¹⁵ BHK appears to be one step removed from the purview of §9839(a) by definition because it does not have an HHS official on staff, but is contractually authorized to perform those functions. Under 45 CFR 1301.2, a Head-Start agency is the equivalent of a grantee, both of which are authorized to act by the responsible HHS official. Those agencies may then assign their authority to engage in those activities to a delegated Head-Start agency, here BHK. Thus, §9839(a), as part of the statutory scheme, instructs the HHS official to delegate its authority to an agency or grantee, who may then

¹⁵. “Head-Start Agency” or “grantee” means a local public or private non-profit agency designated to operate a Head-Start program by the responsible HHS official, in accordance with Part 1302 of this chapter.

subcontract to delegated agencies subject to the HHS standards and directives are critical to the delegated agency, who is not administered by an HHS official, in order to continue its operation, not be penalized in a reduction or loss of funding. Because of HHS's major role in BHK's operations, OPG should have named the HHS, who directed and concurred with the challenged result. BHK's obligations under §9839(a) arises out of the authority delegated to it and subject to the HHS' control. Consequently, this Court should defer to the primary jurisdiction of the HHS and interpret the plain meaning of §9839(a) to allow reasonable public access, as determined by the HHS and its agencies. Yellow Transportation, *supra*. 537 US at 45.

Where ambiguous though, statutes must be construed to avoid absurd or illogical results. Gross v General Motors Corp, 448 Mich 147, 164; 528 NW2d 707 (1995). In Mayor, the dissent, as the appellate court in this case, relied upon a "reasonable minds may disagree" standard for determining whether an ambiguity in the statute existed because "it is extraordinarily difficult to conclude that reasonable minds cannot differ on the correct outcome." Rejecting that approach, the majority's test in Mayor for determining whether an ambiguity exists is: Does the provision either irreconcilably conflict with another provision or is it *equally* susceptible to more than a single meaning? *Id*.

BHK asserts that, if the provision is ambiguous, it must defer to BHK's and HHS' interpretation, Chevron, 467 US at 842-843, because the text of the provision supports the conclusion that primary jurisdiction lies with the HHS. "Each Head-Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, and free of any taint or partisan political bias or personal or family favoritism." This language imposes a duty upon the head-start agency to observe standards.

Yet, it neither dictates nor specifies the standards. It fails to explain “which standards” or designate in that provision who or what organization or person has the authority to create and enforce those standards. Consequently, it can only be read to mean that the standards are developed, created and enforced by the regulatory body. The term “reasonable public access” cannot be read in isolation. A “statutory term cannot be viewed singularly or by itself, but must be construed in accordance with the surrounding text and the statutory scheme.” Breighner v Michigan High School Athletic Assn, Inc, 683 NW2d 639 (2004). The statutory provisions must be viewed at as a whole to avoid and prevent absurd, illogical results. Huron-Clinton Metropolitan Authority v Attorney General, 146 Mich App 79, 85; 379 NW2d 474 (1985). “To that end, the entire act must be read, and the interpretation to be given to a particular word in one section arrived at after due consideration of every other section so as to produce, if possible, a harmonious and consistent enactment as a whole.” Dussia v Merman, 386 Mich 244, 248; 191 NW2d 307 (1971).

This narrow approach of construction is more aligned with the actual text of §9839(a), which limits, not expands, public access, by the use of the word “reasonable.” In *The American Century Dictionary*, Oxford Press, 1995 edition, ‘reasonable’ is defined as “having sound judgment, wise, not excessive or expensive, tolerable and fair.” Unlimited access to every BHK record is excessive, not reasonable. Random decisions compelling disclosure of private information of a private non-profit corporation and its vendors, a private for-profit corporation is overly broad. Unless the private bidders are clearly advised that their complete bids are subject to scrutiny by their competitors and the public, it is unfair to disclose the complete bids. The proposal for bids did not state they would be publicized or become public property. The bidders for the furniture were verbally told that the amounts would be announced, not the content of the bids. (10/15/02, p. 84, 87-88, 120-122, APX. p. 102a, 105a-106a,

138a-139a). It is unwise to disclose the bids submitted by various, private bidders when they are not “records or property of BHK”, nor added to the dispute. Minutes of the meeting or procedure policy are their records, not these bids.¹⁶ The term “reasonable” has to mean that a rationale connection between the information sought and some need to serve the HHS’ statutory purpose can be shown, which was not done here. To the contrary, the appellate court concluded that the reason for the request for disclosure was unimportant. But the disclosure requirement exists by virtue of the head-start statute and the disclosure requirement must have relationship to that statute. Assuming for purposes of argument only that the contents of all the bids were released and some differences in the underlying quality of the furniture existed. What would OPG do with that information? How would that information better the program or advance it goals. Would OPG not be required to seek any relief or advise the HHS if any regulation was not being followed so that the HHS enforced it regulations. OPG’s attempt to seek the information serves no rational purpose. OPG could do nothing with that information and would not benefit from that information where independent, knowledgeable volunteers with the assistance of an engineer evaluated the product. Seeking information for sake of seeking information is neither contemplated nor serves the program purpose. It undermines an efficient and effective administration of the program. Independent audits under 45 CFR 1304 fulfill “watchdog duties”:

Under the scheme, the Secretary of the Department of Health and Human Services is directed to “establish by regulation standards applicable to Head-Start agencies, programs, and projects under this subchapter”, including “minimum levels of overall

¹⁶Under the MFOIA, MCL 15.232(e), a public record is defined as a writing prepared, owned, used, in the possession of, or retained by a public body . . . from the time it is created. Even under the MFOIA, these sealed bids of third-parties were created by third-parties and not solely within BHK’s group “from the time they were created”. Hoffman v Bay City School District, 137 Mich App 333, 336; 357 NW2d 686 (1984) (attorney’s report, after he compiled an investigation into the policies and control of the school district financial and business department, was not a public record even though submitted to the school.)

accomplishment that a Head-Start agency shall achieve.” 42 USC §9836a(a)(1) & 2. The Secretary is also directed under this section to monitor the performance of every Head-Start program and to take appropriate corrective action when a program fails to meet the performance standards established by the regulations . . . 42 USC § 9836a(d).

All but three of the regulations cited in plaintiff’s Second Amended Complaint were promulgated pursuant to the Head-Start Act. See 45 CFR § 1304.1. There is no provision in the Head-Start Act, however, permitting a private citizen to enforce its provisions. Based on the alternative specific remedies mentioned above, Congress’ intent is clear. The remedy for substandard performance by a Head-Start program is an enforcement action by the Secretary of the Department of Health and Human services, not by private litigants. For these reasons, the Court dismisses with prejudice plaintiff’s claims alleging violations of statutory and regulatory provisions relating to the Head-Start Act, for failure to state a claim upon which relief can be granted. Johnson v Quin Rivers Agency for Community Action, Inc., 128 F Supp 2d 332, 336-337 (ED Va, 2001).

The agency’s expenditures are regulated in part by checks and balances under 45 CFR Part 74, (APX. 212a-220a), 42 USC 9836, and 42 USC 9842.¹⁷ BHK provided a listing of Funding Sources and Funds Received for Fiscal Year ending October 31, 2000, including a percentage of state and federal funding. (Ex. Dir. Aff., APX. p. 53a). The Head-Start funds play a minor role in BHK’s overall services and programs provided to the community. Only 2 of its 17 programs are Head-Start related. BHK receives funds from federal, state and private sources. Creating a private right of action to allow

¹⁷(a) Records

Each receipt of financial assistance under this subchapter shall keep such records as the Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such financial assistance, the total cost of the project or undertaking in connection with which such financial assistance is given or used, the amount of that portion of the cost or the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(b) Audits

The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and records of the recipients that are pertinent to the financial assistance received under this subchapter, 42 USC 9842.

post-bid review of rejected bids by local agencies does nothing to enhance oversight of the expenditure of Head-Start funds or its agency in this situation. It only adds expense, the lack of clarity, and uncertainty to the procurement process. Conversely, the disclosure of BHK's procurement policy, the compliance with HHS audit and enforcement regulations and procedures, the use of an independent local boards and committees, and the involvement of many private community-minded and disinterested volunteers ensure the integrity of the system and constitutes reasonable public access.

The lower court's broader interpretation of §9839(a) conflicts the HHS statutory provisions, 42 USC 9836 and 9842, to the extent that it undermines the HHS enforcement authority of the program. As the appellate court admits, §9839(a) does not expressly create a private right to the general public to obtain records from any agency – just because they can do so. (9/14/01 hrg. Mot. for Protective Order, p. 11-16, APX. p. 19a-24a).¹⁸ The more practical, common sense reading of §9839(a) is to read it in conjunction with the entire statute. As such it would then require the 'reasonable public access' to be reviewed under HHS guidelines and regulations in 45 CFR 1301.30, and its enforcement provisions, 45 CFR 1304 *et. seq.*

Neither 42 USC 9839(a) nor §9836 demonstrate an intent to delegate to the general public or to state courts any authority to oversee the HHS or any Head-Start agency. 42 USC 9839(a) does not say that the "public is entitled to access to records or documents." Rather, it states that the agency shall provide reasonable public access. This form of expression is narrower and suggests that the agency determines the nature of reasonable access, not the public. The agency has determined and should determine what is reasonable public access. The HHS and BHK agree on that issue.

¹⁸The lack of a private right in 9839(a) was raised by Defendant's Motion for Summary Disposition Brief where he cited State Defender Union Employees v Legal Aide Defender, 230 Mich App 426; 584 NW2d 359 (1998). (Mot for Prot. Ord., p. 16, APX. p. 24a).

42 USC 9839(a) can be read to authorize “agencies” to create standards to effectively and efficiently manage their own program to address the needs of and provide maximum benefits to the economically disadvantaged recipients. The central purpose of these provisions overall is to address the recipient’s substantive needs. As an administrative process, § 9839(a) addresses only a limited and minor aspect of the entire statute. It is intended to aid, not detract from the Head-Start program goals. For example, in its initial years, political difficulties of the program triggered congressional concern and action restricting the program to remain focused on the substantive achievements of the recipients. When agencies were improperly using the program to advance political causes of the economically disadvantaged, amendments were added to prohibit protests against local officials and the initiation of voter-registration programs. (1967 Amendment Rpt, APX. p. 231a). Congress would not be deterred from the focus of the statute: to address the needs of the disadvantaged.

The only reasonable construction to §9839(a) is that this one sentence of a broadly-worded policy statement is part of an extensive regulatory scheme designed to assist the economically disadvantaged in their early years. The goal is served by developing uniform and consistent, nation-wide standards as approved through HHS policy-making process, not by adding another layer of review. Ad hoc decisions by local personalities or state courts undermine that primary goal and divert attention to immaterial issues. The case presents a perfect example of how far afield the broad interpretation of § 9839(a) will take a local agency. Under Michigan law, OPG has no standing to challenge the bidding process or award, even if BHK were a public body. Michigan has a long history of holding that disappointed bidders have no right to a contract even in the municipal context, Talbot Paving Co v City of Detroit, 109 Mich 657; 67 NW 979 (1896). There, a disappointed bidder could not seek damages

because the benefit of any procurement provision runs to the public, not the bidder.¹⁹ Competitive bidding is not intended to benefit bidders with genuinely competitive bids. The incidental benefit received by bidders from competitive bidding does not allow an unsuccessful bidder to bring a private action. City Communications, Inc v City of Detroit, 650 F Supp 1570 (ED Mich, 1987) citing Malan Construction Corp v Board of County Road Commissioners, 187 F Supp 937 (ED, Mich, 1960).

BHK did assert that reasonable public access under § 9839(a) was triggered by appropriate community groups, which does not include OPG. OPG is not a community group. But OPG reads this provision ‘the reasonable public access to records’ separate from the association with community groups. Giving this one sentence the most expansive interpretation possible, OPG implies a private cause of action and the lower courts agreed. But BHK submits that public policy is not served by OPG’s request. Ford Motor Company’s performance of service or sales of fleet vehicles to the federal government does not permit an intensive, across-the-board access to all of Ford’s records by one of its disappointed part suppliers. The Detroit Archdiocese’s financial documents and records are not subject to general public review because it operates two Head-Start agencies. Such a broad interpretation is unwise and produces absurd, far-reaching and unintended consequences. Venturing into the domain of a private company’s records because maybe some of the federal funds were used for an expenditure of a tangential nature is too far a field from the objective of the watchdog provisions in the Head-Start statute and other federal statutes such as 31 USA 3729, the False Claims Act.

¹⁹Standing, a legal term used to denote the existence of a party’s interest in the outcome of litigation, requires a showing of: (1) a legally protected interest which is in jeopardy of being adversely effected; and (2) a sufficient personal stake in the outcome of a dispute to ensure that the controversy to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution. Taylor v Blue Cross/Blue Shield of Michigan, 205 Mich App 644; 517 NW2d 864 (1994). Here, the issue of standing was not raised. Rather, the lack of a private report on cause of action to enforce 9839(a) was asserted.

Open bids may be proper for public entities, but determining the scope of “public access” is a legislative, policy-making decision, as demonstrated by the state and federal FOIAs, which details the process and consequences within the FOIA to serve that primary purpose. Public policy does not encourage dissemination of private information of the bidders, if it will compromise BHK’s ability to do business and BHK’s ability to obtain the lowest possible price. No evidence suggested that “open bids” for private-company contracts facilitates competition. Competition may be hurt if private bidders forego submitting bids because the bids are publicly disseminated. Bids may reveal competitive advantages, trade secrets, or manufacturer’s mark-ups. A low bid might jeopardize a private business entity’s position with its suppliers where the supplier opposes large discounts. (10/15/02 hrg. p. 118-119, APX. p. 136a-137a). Publicizing sealed bids may chill bids that are tantamount to a silent or informal donation. Once public, other customers of the lowest bidder may question why the price to them was higher. (10/15/02 hrg., p. 91, APX. p. 109a). A request for a sealed or closed bid is by definition, an exclusionary process designed to protect the information supplied. If disclosure causes fewer bids to be submitted, then the competition will be lessened.

Rather, sufficient public access is available through community volunteers that operate BHK. (10/15/02 hrg., p. 108-109, APX. p. 126a-127a). The purpose of the HHS is to serve disadvantaged children and their families, not OPG. (House Report No. 90-866, October 27, 1967, p. 30, APX. p. 232a). BHK asserts that concern over the private corporation’s expenditures for office furniture is not the type of dispute 9839(a) was intended to protect. In Hodder v Schoharie County Child Development Council, Inc., 1995 WL 760832 p. 4 (ND NY, 1995) (APX. p. 268a), the HHS statute was found to protect disadvantaged children and their families, who need the special services, but not to support a

cause of action for employees. The employers were not part of the class to be protected by the statute.

The primary goal of the HHS statute is not to promote business.

The Court may infer a private right of action from a federal statute that does not expressly create one only if the statute's language, structure, and legislative history reveal Congress' intent to create a private right of action. See *Thompson v Thompson*, 484 US 174, 179 (1988); *Touche Ross & Co. v Reddington*, 442 US 560 (1979); *Cort v Ash*, 442 US 66 (1975). Courts normally try to define Congressional intent by applying the four *Cort* factors: 1) whether plaintiffs belong to the class for whose special benefit Congress passed the statute; 2) whether the indicia of legislative intent reveal a congressional purpose to provide a private cause of action; 3) whether implying a private cause of action is consistent with the underlying purpose of the legislative scheme; and 4) whether the plaintiff's cause of action concerns a subject that is traditionally relegated to state law. *Merrell Dow*, 478 US at 810-11; *Cort*, 442 US at 78, Hodder, pg. 4. (Emphasis added.)

Here, the appellate panel erroneously applied the established precedent for implying or creating new causes of action. In Pitsch v ESE Michigan Inc., 233 Mich App 578, 586; 593 NW2d 157 (1996), the state court held that, although no expressed private cause of action was contained in the one provision of the Environmental Response ACT (MERA) for recovery of environmental clean-up, several other provisions authorized contribution to private persons from the potentially responsible persons for environmental clean-up and expressly provided for a remedy for recovery for the potentially responsible person. 233 Mich App at 589. Pitsch supports BHK's argument. In stark contrast to the facts in Pitsch, no express language for a remedy exists in §9839(a) or in any other HHS statutory provision authorizing a private cause of action.

In Long v Chelsea Community Hosp, 219 Mich App 578, 581-582; 557 NW2d 157 (1996), a new, private cause of action was found only if it is contained in the text of the statutory scheme.

Plaintiff argues that the statute creates a private right of action for malice under the present circumstances. The common law recognizes no cause of action for malice on these facts. If the common law provides no right to relief, and the right to such relief is instead provided by statute, then plaintiffs have no private cause of action for enforcement of the right unless: (1) the statute expressly creates a private cause of action

or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. *Bell v League Life Ins. Co.*, 149 Mich App 481, 482-483; 387 NW2d 154 (1986) . . .

Moreover, recognition of a private cause of action for malice under the statute would frustrate and undermine the legislative purpose of providing immunity. A Court's decision regarding private rights of action must be consistent with the legislative intent while furthering the Legislature's purpose in enacting the statute. *Gardner v Wood*, 429 Mich 290, 301; 414 NW2d 706 (1987). The Legislature plainly did not intend to create a private cause of action. Its intent to confer certain immunities would be frustrated if this Court distorted its careful choice of language by recognizing a private cause of action for malice. We decline to recognize such a private cause of action under the statute. Accordingly, plaintiff has no cause of action for malice and the circuit court correctly granted summary disposition to defendants. Long v Chelsea Community Hosp., 219 Mich App 583-585.

§9839(a) may be enforced through the HHS regulatory scheme either in-house or by administrative review to a federal court on appeal. §9839(a) does not authorize an independent action. Authorization for a private cause of action or remedy from administrative decisions can be found in the HHS statute. Rather, the enforcement provisions of the statute and the HHS regulations provides an adequate means of enforcement. If the local agency is not complying with HHS regulations, that is between the HHS and that local agency, not the general public. Based on the Pitsch test, no claim can be asserted by OPG in this case.

Nonetheless, the appellate court implied a cause of action and discounted the Chevron Doctrine by relying on Gulf Offshore Co v Mobile Oil Corp., 453 US 473, 478; 101 S Ct 2870, 2875; 69 L Ed 2d 784 (1981). But Gulf Oil actually supports BHK's argument. It states:

Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. See *ibid.*; *Claflin*, *supra*, at 137. See also *Garner v Teamsters*, 346 US 485, 74 S Ct 161, 98 L Ed 228 (1953) (grievance within jurisdiction of National Labor Relations Board to prevent unfair labor practice not subject to relief by injunction in state court).

There, the employee was injured while debarking from an oil rig during the employees' evacuation prior to a hurricane. Unlike here, that employee's tort claim did not trigger any conflicts between the federal law when the state court accepted concurrent jurisdiction. Acceptance of the state-court jurisdiction there would not frustrate the operation of OCSLA (Outer Continental Shelf Lands Act). The federal statute in Gulf Oil was only incidentally involved with the substance of the tort claim. For that reason, Gulf Oil supports BHK's argument that the state court's acceptance of jurisdiction without adequate due deference to the HHS' interpretation is improper. Rather, Title 42's expansive statutory and regulatory scheme imply that the federal agency and federal court by appeal have jurisdiction and the state court should not interfere. Inconsistent decisions of what the statute means directly impacts and frustrates the HHS' ability to fulfill its statutory mandate. Implying a cause of action under §9839(a) undermines the goals of the HHS statute.

B. The lower courts' opinions erroneously created a federal statutory freedom of information requirement which is broader than those statutes specifically designed to disclose records of public entities.

The Freedom of Information Acts, 5 USC 552 *et. seq*; MCLA 15.231 *et. seq.* do not apply to BHK, a private, non-profit organization. To the extent that BHK provides any records to HHS, which are housed with HHS, OPG would access them under the federal FOIA in federal court. The purpose of that statute is to provide public access to any and every member of the general public of public records. In Michigan, the purpose of its FOIA is to allow interested members of the public sufficient information to foster their participation in the *affairs of government* so that the general public *may fully participate in the democratic process*. MCL 15.231. The primary goals of the FOIA are not remotely similar to the Head-Start statutory goals. Moreover, they both contain restrictions and detailed procedures that are capable of judicial interpretation, unlike § 9839(a). See MCL 15.233 (cost

assessed); MCL 15.235 (entity's response procedure).²⁰ The MFOIA's detailed list of exemptions highlight the importance of privacy, MCL 15.244. In Kocher v Dept of Treasury, 241 Mich App 378; 615 NW2d 757 (2000), recovery of the names of abandoned property owners under the Unclaimed Property Act was exempt from disclosure under the FOIA because this information was private and would not contribute to the public's understanding of governmental activities. See also, Kestenbaum v University of Michigan, 414 Mich 510; 327 NW2d 783 (1982), where the court cautioned against broadly interpreting the FOIA. "When a statute is so broad that it makes all information available to anyone for any purpose, the court has an obligation to narrow its scope by judicial interpretation," Kestenbaum, *supra*, n 11, citing Kestenbaum, *supra*, 97 Mich App 27, 294 NW2d 228. Conflicting policy considerations were balanced by the federal and state legislatures before finalizing their detailed provisions. By analogy, this Court should cautiously interpret § 9839(a) to avoid the expanded judicial interpretation that occurred in this instance because it is tantamount to judicial legislation without the benefit of the policy decision-making process, the role of a Legislature.

The appellate court did not see the parallel, but instead saw the broad policy statement and the lack of specifics in the provision as a congressional *policy decision* to allow unlimited access subject only to judicial intervention. (APX p. 175a.) The flaw in its reasoning is that its text reflects a congressional intent to leave the question of management and administrative standards to the HHS, an arm of the legislative branch, is expressly provided for in 42 USC 9836(1)(C). Discounting HHS' right to enforce its regulations renders it powerless, placing local and state agencies in direct conflict with

²⁰Although initially it was believed OPG's FOIA was under both MFOIA and its federal counterpart, 5 USC 552 *et. seq.*, it was later understood the complaint did not include a federal FOIA request. Rightfully so, because by a federal FOIA request under 5 USC 552 must be enforced in federal district court. 5 USC 552(4)(B), which expressly authorized the federal district judge to "enjoin the agency from withholding."

the HHS standards, requirements and directives. Flint City Council v State, 253 Mich App 378; 394 NW2d 604 (2002) (Under the Local Government Fiscal Responsibility Act, the scope of review of the financial review team's findings was within the Governor's discretion.) Here, too, the HHS was intended to control "reasonable public access".

III. REASONABLE PUBLIC ACCESS TO BHK'S RECORDS AND DOCUMENTS UNDER 42 USC 9839(a) WAS PROVIDED WHEN IT DISCLOSED ITS PROCUREMENT POLICY, CONDUCTED PUBLIC HEARINGS, AND ANNOUNCED THE AMOUNT OF THE WINNING BID FOR OFFICE FURNITURE.

Alternatively, reasonable public access to the local agency's records and documents occurred. (Bid Proposal and Public Notice, APX. p. 181a; Revised Bid Proposal, APX. p. 184a). BHK adopts and incorporates all its former arguments on statutory construction of the term "reasonable public access." MCR 2.113(G). The bid was publicly posted. It was reviewed by the Building Committee and an engineering consultant. Both the Board and the Building Committee were comprised of a variety of citizens and volunteers, none of whom were accused of any political, family, or personal bias. Mr. Ham acknowledged that BHK's Director actually wanted a local businessman like OPG to benefit from this contract. (*Id.* p. 135, APX. p. 153a). Mr. Ham admittedly never attended a BHK meeting to express his or OPG's concerns about BHK's expenditure of funds. (*Id.*, p. 142, APX. p. 153a).

At bidders' request, the deadlines were extended to January 29, 2001. (01/15/02 Bd. Mtg. Minutes, APX. p. 188a). OPG was admittedly advised of these developments, had the opportunity to submit yet another bid, and was fully informed of the events. (10/15/02 hrg. p. 136-138, APX. p. 154a-155a). On January 29, 2001, the Building Committee met in a public meeting, reviewed the bids, and kept minutes of the meeting:

Various manufacturers and styles of tables and chairs were bid for the small conference room. Low bidder for the conference chairs was Commercial Office interiors. Norther

Stationers was low bidder on the table with JL Hamett second low bidder. KI was low bidder on the folding chairs and racks for the large conference room. Recommendation was made to have an upgrade on fabric for the chairs for better durability.

Erick Bjorn moved to accept Norther Stationers bid for the conference table, to purchase conference chairs for the small conference room/meeting room from Commercial Office Interiors and folding conference chairs and storage racks from KI with Director Liimatainen making the final choice at his discretion on fabric and quality. Ray Tiberg supported and the motion carried. (APX. p. 192a).

Mr. Ham also admitted that BHK's Director treated him very well, advised him of the information and developments, and gave him two opportunities to offer bids. (10/15/02 hrg. p. 133-136, APX. p. 151a-154a). He was personally advised that his first quote was too high and adjusted his bid to the amended bid request, as he understood it, reducing his bid by several thousand dollars. (*Id.*, p. 130-133, APX. p. 148a-151a).

Moreover, he admittedly received a call advising him that the bids would be opened in a public meeting. He had attended public meetings in the past for public-project bids. (*Id.*, p. 130, 142, APX. p. 148a, 160a). "But there was no specific invite for me to be there." He was not prohibited from attending. He fully understood that BHK was not subject to the same rules as public entities, but he merely wanted access to the bids to look at exactly what each bidder was bidding on. (*Id.*, p. 144, APX. p. 162a). Initially, he did not care about the price or the bidder's financial information. (*Id.*, pgs. 143-44, APX. p. 162a-163a). By the end of the hearing, he changed his mind and wanted "prices" too. But overall, he was not concerned about prices. (*Id.*, p. 133, APX. p. 151a).

Mr. Ham's testimony does not justify the invasion of BHK's privacy. OPG's agent, obviously frustrated at being substantially underbid, demonstrated confusion and speculation. He could not recall whether the "\$20,000.00 too much", was \$20,000.00 over the successful bid, or \$20,000.00 over-budget. (*Id.* p. 132, 138, APX. p. 150a-156a). OPG is in the business of designing offices and

installing furniture. The winning bid included Herman-Miller's Products, whose products were accessible over the internet. Mr. Ham understood their specifications. (*Id.*, pg. 130133, APX. p. 148a-151a). He had no genuine reason that served the HHS's goals for accessing these bids.

But the bottom line is that BHK submits that the legal principle is critical not only to its operations, but to any organization receiving federal monies under the Head-Start Program, and other federal agency programs. The rule in the state law needs to be clear to allow BHK to effectively and efficiently fulfill its obligations to the HHS program goals. BHK's Director and its Board request this Court issue an opinion that prevents what is tantamount to "meddling" with its operations and allow it to serve its recipients. BHK's point is that it has no legal obligation to provide copies of these bids. §9839(a) does not provide the public with a right of broad access to its documents and records. BHK has no obligation to provide any additional information to assist OPG in gaining a competitive advantage. Even where fraud, improper, or illegal activity are alleged or evidence, that problem should fall within the purview of the regulatory agency and the law enforcement agencies. But here, no evidence of fraud or even a personality conflict was presented. Based upon this record and BHK's and the HHS procedures, including the procurement policy voluntarily provided, OPG had reasonable public access²¹.

In summary, this Court can reverse the lower courts' decision because state-court jurisdiction is either prohibited or unwise. BHK asserts that, even if the courts of general jurisdiction may review

²¹Even in due process claims in a civil rights claim where an entitlement to some governmental benefit is triggered, the standard is notice and an opportunity to be heard, *Dow v State*, 396 Mich 192; 240 NW2d 450 (1976). Although this dispute involves non-governmental, private properties, OPG would be hard pressed to argue that BHK's procedures failed to permit either notice or any opportunity to be heard. In the private context, OPG had reasonable public access as allegedly required under 42 USC 9839(a) and a fair opportunity to have OPG's bid considered, assuming for purposes of argument only that the state court can entertain the substance of the dispute.

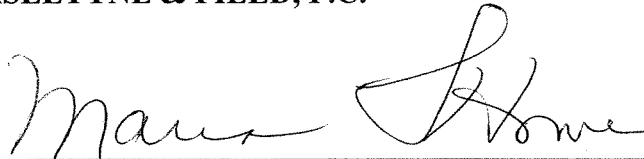
an agency's failure to comply with its regulations, it is done by administrative review, not by an independent action. But if this Court considers the issue, a decision should be entered for BHK and reversing the lower courts based upon the plain meaning of the statutory provision as it is derived from its juxtaposition within this statutory scheme and expansive regulatory system. Even if this provision is deemed ambiguous, a less broad statutory construction of 42 USC 9839(a) is warranted and its standards should be directed by the HHS's policy and decision-making process, which were followed by BHK in this instance. Under any of these grounds, this Court should conclude that OPG's lawsuit should be dismissed, the appellate court decision reviewed and a judgment entered for BHK as a matter of law for a failure upon which relief can be granted.

CONCLUSION

WHEREFORE, BARAGA-HOUGHTON-KEWEENAW CHILD DEVELOPMENT BOARD, INC., respectfully request that this Court issue an opinion reversing the lower courts' decisions.

Respectfully Submitted,

**JOHNSON, ROSATI, LABARGE,
ASELTINE & FIELD, P.C.**

A handwritten signature in cursive script, appearing to read "Marcia L. Howe", is written over a horizontal line.

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